Supreme Court, U.S.
FILED
AUG 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-26

In the Supreme Court of the United States

OCTOBER TERM, 1989

CLIFFORD B. HUBBARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

ALFRED F. ARQUILLA
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Maj., JAGC, USA

RANDY V. CARGILL
Capt., JAGC, USA

JONATHAN F. POTTER
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency
Falls Church, VA 22041-5013

QUESTION PRESENTED

Whether the admission at trial of the recorded and sworn testimony of an unavailable witness given at a preliminary hearing violated the Confrontation Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Delaware v. *Fensterer*, 474 U.S. 15 (1985)	8
Ohio v. *Roberts*, 448 U.S. 56 (1980)	7
United States v. *Spindle*, No. CM 443294 (A.C.M.R. 1984), aff'd, 28 M.J. 35 (C.M.A. 1989), petition for cert. pending, No. 89-25	2, 8

Constitution, statute, and rules:

U.S. Const. Amend. VI (Confrontation Clause)	7
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 31(b), 10 U.S.C. 831(b)	5
Art. 32, 10 U.S.C. 832	3, 4, 5, 6
Art. 34(a), 10 U.S.C. 834(a) (1982 & Supp. V 1987)	4
Art. 38, 10 U.S.C. 838 (1982 & Supp. V 1987)	4
Art. 80, 10 U.S.C. 880	2
Art. 118, 10 U.S.C. 918	2
Art. 134, 10 U.S.C. 934	2
Fed. R. Evid. 804(b)(1)	6
Mil. R. Evid. 804(b)(1)	6

Rules – Continued: Page

Rules for Courts-Martial:

Rule 405(f) 4

Rule 405(g) 4

Miscellaneous:

Manual for Courts-Martial, United States – 1984 .. 4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-26

CLIFFORD B. HUBBARD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals affirming petitioner's conviction (Pet. App. 1a-14a) is reported at 28 M.J. 27. The order modifying that opinion (Pet. App. 1b) is not yet reported. The opinion of the Court of Military Review (Pet. App. 1d-10d) is reported at 18 M.J. 678.

JURISDICTION

The judgment of the Court of Military Appeals was entered on March 10, 1989. A petition for reconsideration was denied on May 9, 1989. The petition for a writ of certiorari was filed on July 7, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(c) (Supp. V 1987).

STATEMENT

Petitioner, a member of the United States Army, was tried by a general court-martial at Fort Shafter, Hawaii. He was convicted of unpremeditated murder, felony murder, attempted sodomy, and committing indecent acts with a male under the age of 16, in violation of Articles 80, 118, and 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 880, 918, and 934.[1] He was sentenced to life imprisonment, a dishonorable discharge, and forfeiture of his pay. The convening authority approved the findings and sentence. The Army Court of Military Review affirmed. Upon discretionary review, the Court of Military Appeals dismissed the unpremeditated murder charge on the ground that it was multiplicious with petitioner's conviction of felony murder, but otherwise affirmed the findings and sentence.

1. On the evening of February 5, 1982, Derek Kusumoto and his 14-year old twin brother, Dominic, went to a bowling alley near their home at Schofield Barracks, Hawaii. Tr. 251-252. Derek left the bowling alley at about 8:30 p.m., telling his brother that they would meet at 9 p.m. at their home. Tr. 252. Dominic returned home; Derek did not. Tr. 238. At 11 p.m., the boys' father, Lieutenant Colonel Kusumoto, reported to the military police that Derek was missing. *Ibid.* The following evening, at about 10:30 p.m., Colonel Kusumoto identified the dead body of his son Derek at the Tripler Army Medical Center in Hawaii. Tr. 240. See Pet. App. 3a.

---

[1] Petitioner was convicted of crimes stemming from the same incident in which petitioner's confederate Thomas Spindle was involved. Spindle was separately tried, and his convictions (with one minor modification) were upheld on appeal. *United States* v. *Spindle*, No. CM 443294 (A.C.M.R. 1984), aff'd, 28 M.J. 35 (C.M.A. 1989), petition for cert. pending, No. 89-25.

At about 5 p.m. on February 6, 1982, Specialist Thomas Spindle reported that he had found Derek's body at the entrance to an abandoned bomb shelter. Tr. 286-287. Spindle said he had checked the body for a pulse and, finding none, did not otherwise disturb the body. Tr. 292. Spindle described Derek's partially clothed body to investigators. He said the boy was wearing white athletic socks with red and blue stripes. Tr. 304. When investigators found Derek's body, the socks were rolled down to Derek's ankles; the socks had red and yellow stripes, but the stripes were not visible. GXs 7, 30. See Pet. App. 4a.

Doctor Wong, a forensic pathologist, examined Derek's body. There were, according to Dr. Wong, "many abrasions, contusions with abrasions, contusions with swellings, a laceration, echymosis, and also excoriation of the skin surface in practically or * * * in most of the surface of the body." Tr. 330-331. Doctor Wong also found a bite mark on Derek's chest. Tr. 354-355. He determined that the cause of death was "asphyxia due to suffocation" caused by "some foreign object [being] applied to * * * external air passages." Tr. 344-345. See Pet. App. 5a.

Spindle identified petitioner, Private Joseph Courtney, and Private Duane Reynolds as alibi witnesses for his whereabouts on the evening of February 5, 1982. Tr. 305. Private Courtney, however, implicated petitioner in Derek's death. Based on Courtney's pretrial statements and other evidence, petitioner was charged with murdering Derek.

2. a. Article 32 of the UCMJ, 10 U.S.C. 832, provides that no charges can be referred to a general court-martial until there has been a thorough and impartial hearing on all matters set forth in the charges. An Article 32 hearing is similar to a preliminary hearing conducted to determine probable cause to hold a defendant for trial. The accused in an Article 32 hearing has the right to be informed

of the charges against him, to be present during the hearing, to be represented by counsel, to be informed of the witnesses that the prosecution expects to call, to be informed of the identity of his accuser, to cross-examine all available witnesses, and to present any testimony or documentary evidence in his defense. He may also present any evidence that would mitigate the severity of the offenses. A defendant has the right to have defense counsel appointed to assist him during the hearing. Art. 38, UCMJ, 10 U.S.C. 838 (1982 & Supp. V 1987); Rule for Courts-Martial 405(f) and (g), *Manual for Courts-Martial, United States—1984*. Moreover, the convening authority may not refer a charge to a general court-martial for trial without independently assessing the sufficiency of the evidence. Art. 34(a), UCMJ, 10 U.S.C. 834(a) (1982 & Supp. V 1987).

b. In this case, Private Courtney testified under oath during an Article 32 hearing. Petitioner and his appointed counsel were present during his testimony. Tr. 421. Spindle, who was also accused of participating in Derek's murder, was present with his appointed counsel. *Ibid.* The verbatim transcript of Courtney's testimony during the hearing totalled 134 pages, Tr. 422-556, of which 43 pages consisted of defense counsels' cross-examination of Courtney. See Tr. 465-481, 539-542 (cross-examination by petitioner's counsel); Tr. 481-495, 542-555 (cross-examination by Spindle's counsel).

Private Courtney testified twice at the hearing. Initially, Courtney denied being with petitioner and Spindle on the evening of February 5, 1982. Tr. 425, 428. Courtney acknowledged that he had made a sworn statement to the Army CID that he was at the bunker with petitioner and Spindle when Derek was murdered, Tr. 427, but Courtney testified that the statement was not true. *Ibid.* The Article 32 investigating officer warned Courtney about the possi-

bility that he could be prosecuted for giving a false official statement and advised Courtney of his rights under Art. 31(b), UCMJ, 10 U.S.C. 831(b). Tr. 433-434. Courtney indicated that he wanted to speak with a lawyer, Tr. 434, and he was given the opportunity to do so. The Article 32 hearing was then adjourned for two days. Pet. App. 5a-6a.

When the hearing resumed, Courtney testified that on the evening of February 5, he, petitioner, and Spindle met Derek outside an enlisted men's club located near the bowling alley where Derek and his brother had been. Tr. 438, 442. They asked Derek if he "wanted to go get high," and Derek said he did. Tr. 444. They walked to a tree near the bunker and smoked marijuana for about ten minutes. Tr. 446-447. Petitioner and Spindle then began wrestling with each other and "started pushing the kid around." Tr. 447. At one point, petitioner sat on Derek's chest, while Spindle pulled down Derek's pants. Tr. 448. Petitioner rolled Derek onto his stomach, and Spindle held Derek down while petitioner "started rectal intercourse." When Derek tried to scream, Spindle put his hand over Derek's mouth. Tr. 448-449. When Courtney tried to intervene, petitioner pushed him away and brandished a knife. Tr. 452-453.[2] Ultimately, Derek went into a "seizure" and stopped struggling. Tr. 458. Courtney pushed petitioner and Spindle off Derek and checked Derek's pulse. Tr. 459. Finding none, Courtney said, "he's dead." *Ibid.* Thereafter, petitioner and Spindle carried Derek's body three-quarters of the way down the bunker stairs and let it

[2] Investigators found a buck knife, GX 25, near the bunker. Tr. 298-299, 319-320. There were no identifiable fingerprints on the knife.

roll the rest of the way, while Courtney held a flashlight at the top of the stairs. Tr. 461-462.[3]

c. Before trial, Courtney left Hawaii for the mainland. Despite diligent efforts by the Army to locate Courtney, he was not found before the trial. Pet. App. 4d.[4]

At trial, the government moved, pursuant to Mil. R. Evid. 804(b)(1),[5] to admit Courtney's testimony at the Article 32 hearing as the testimony of an unavailable witness. Tr. 363. Petitioner objected, arguing that Courtney was not unavailable and that petitioner's counsel did not have a full opportunity to cross-examine Courtney at the hearing. *Ibid.* Petitioner alluded to the autopsy report that had been prepared after Courtney testified, implying that he wanted to question Courtney about the report. *Ibid.* After the government established that Courtney was unavailable to testify because he was absent without leave, the trial judge admitted Courtney's testimony at the Article 32 hearing. Tr. 399.

d. During trial, petitioner called Dr. Larry O'Neil, a dentist,[6] who had examined the bite mark on Derek's

---

[3] Asked to explain why he earlier denied being with Spindle and petitioner, Courtney stated that he was afraid of them because "they can still get at me, sir." Tr. 537.

[4] Petitioner states that Courtney "resurfaced" after trial. Pet. 3. Courtney was found approximately four months after petitioner's trial and was discharged from the Army in November 1982. Petitioner never asked for a new trial in light of Courtney's subsequent availability.

[5] Rule 804(b)(1) of the Military Rules of Evidence provides that the verbatim record of an Article 32 proceeding is admissible at trial if the declarant is unavailable. Accord Fed. R. Evid. 804(b)(1).

[6] Petitioner overstates Dr. O'Neil's qualifications by calling him a "forensic odontologist." Pet. 3. In fact, Dr. O'Neil was board certified in "general dentistry." Tr. 668. His training in forensic odontology consisted of a one-week course at the Armed Forces Institute of Pathology. Tr. 670. Bite mark identification was only one of three

chest. Tr. 664. Dr. O'Neil testified that he found no similarity between petitioner's bite pattern and the chest bite mark. Tr. 679. He testified that the chest bite mark was not consistent with the bite pattern of petitioner, Spindle, or Courtney. Tr. 673-674, 678-679.

3. The Army Court of Military Review affirmed. Pet. App. 1d-10d. Citing *Ohio* v. *Roberts*, 448 U.S. 56 (1980), the court upheld the trial court's finding that Courtney's former testimony was admissible. Pet. App. 2d. The court agreed with the trial court that Courtney was unavailable and found that petitioner's cross-examination of Courtney was "thorough, lengthy and vigorous." *Id.* at 8d. The court concluded, therefore, that the admission of Courtney's pretrial testimony did not violate the Confrontation Clause. *Ibid.*

4. The Court of Military Appeals affirmed. Pet. App. 1a-14a. The court found that Courtney was unavailable to testify at trial and concluded that the admission at trial of his testimony at the pretrial hearing did not violate the Confrontation Clause. The court observed that "it is apparent from the questions propounded by defense counsel * * * at the Article 32 hearing that one of their objectives was to impeach Courtney." Pet. App. 10a. Responding to petitioner's argument that his cross-examination of Courtney was hindered by the unavailability of Dr. O'Neil's bite mark evidence, the court noted that the prosecution "did not hold back from the defense" but "promptly" provided the defense all evidence as it became available. *Ibid.* The court emphasized that the "Confrontation Clause guarantees an *opportunity* for effective cross-examination, not

---

areas of study during the one-week program. *Ibid.* Dr. O'Neil admitted that in a close case "someone with better credentials than I should probably testify." Tr. 665. Dr. O'Neil had never before testified about bite marks. Tr. 688.

cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Id.* at 11a n.5 (quoting *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985)).

ARGUMENT

Petitioner raises the same claims that are asserted by his confederate, the petitioner in *Spindle* v. *United States*, No. 89-25. For the reasons given in our brief in opposition in that case (a copy of which has been provided to petitioner's counsel), petitioner's claims do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ALFRED F. ARQUILLA
Col., JAGC, USA

DANIEL J. DELL'ORTO
Lt. Col., JAGC, USA

GARY L. HAUSKEN
Maj., JAGC, USA

RANDY V. CARGILL
Capt., JAGC, USA

JONATHAN F. POTTER
Capt., JAGC, USA
Appellate Government Counsel
Government Appellate Division
United States Army Legal Services Agency

AUGUST 1989

U.S. GOVERNMENT PRINTING OFFICE: 1989—241 699/00393